

9-2102-8967-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COUNTY OF HENNEPIN

In the Matter of the Hennepin
County Hauler's License of Poor
Richard's, Inc.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on August 29, 1994, at the Visitor's Center, Hennepin County Environmental Services Building, 417 North Fifth Street, Minneapolis Minnesota.

Lon M. Erickson, Assistant County Attorney, Hennepin County Attorney's Office, 2000 Government Center, Minneapolis, Minnesota 55487, appeared on behalf of Hennepin County. Robert E. Cattanach, Attorney at Law, Dorsey & Whitney Law Firm, Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota 55402-1498, appeared on behalf of Poor Richard's, Inc. The record closed on September 16, 1994, upon receipt of the Licensee's Reply Brief.

Following the issuance of this Report, the matter will be considered by the Hennepin County Board, which shall consider the Report of the Hearing Officer at its next possible board meeting and may adopt or modify the Report and take action, reject the Report of the Hearing Officer, or remand for further hearing. The parties shall be notified of the action of the Hennepin County Board within thirty (30) calendar days following its determination. Appeal of a decision by the Hennepin County Board shall be made to the District Court within thirty (30) calendar days following the Board's action. The District Court shall determine whether the record of the hearing contains evidence upon which the Hennepin County Board could have reached its decision and whether the Board abused its discretion in reaching a decision. All further inquiries, including the method, if any, for filing exceptions to the Findings of Fact, Conclusions of Law contained herein should be directed to Janet B. Leick, Hennepin County Department of Public Works, Environmental

Management Division, 417 North Fifth Street, Suite 200, Minneapolis, Minnesota 55401.

STATEMENT OF ISSUE

The issue in this proceeding is to determine whether Poor Richard's, Inc. has appropriately billed, collected, and remitted the Solid Waste Management Fee and Reports from January 1, 1994, to the present as required by Hennepin County Ordinance 15, § II, subsection 2 and 3, consistent with Minn. Stat. § 400.08, subd. 4(c), which authorizes Hennepin County to require, as a

condition of a solid waste hauler's license, that the hauler collect a Solid Waste Management Fee from its customers that generate solid waste in Hennepin County and remit that fee to Hennepin County; and consistent with Minn. Stat. 473.811, subd. 3(a), 5, 5(c).

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Hennepin County is a political subdivision of the State of Minnesota with offices at Hennepin County Government Center, Minneapolis, Minnesota.

2. The Hennepin County Environmental Management Division is responsible for the licensing of municipal solid waste haulers operating in Hennepin County.

3. Poor Richard's, Inc. is a Minnesota corporation with its principal office located at 400 Whitall Street, P.O. Box 17022, St. Paul, Minnesota 55117.

4. Poor Richard's, Inc. is engaged in the business of hauling and disposing of solid waste.

5. Poor Richard's, Inc. has been licensed by Hennepin County since January 1, 1989, to haul and dispose of solid waste generated in Hennepin County. Richard Wybierala is currently the president of Poor Richard's, Inc. and, prior to that position, was the manager of the company.

6. By letter dated October 13, 1993, (Ex. 1) Poor Richard's, Inc. was notified of a public hearing to be held on October 26, 1993, at the Hennepin County Government Center for the purpose of adopting Hennepin County Ordinance No. 15. Enclosed with the letter was a copy of the proposed Ordinance No. 15.

7. By letter dated December 3, 1993, (Ex. 2) Poor Richard's, Inc. received notice of the implementation of Hennepin County Ordinance No. 15, along with a copy of Hennepin County Ordinance No. 15 as it was passed by the Hennepin County Board of Commissioners. Enclosed with the letter were copies of Board resolutions. One resolution notified Poor Richard's, of the reduction of the Hennepin County tipping fee from \$95 per ton to \$60 per ton. Another resolution established a hauler--collected Solid Waste Management Fee of 14 percent for nonresidential generators and on Hennepin County Mixed Municipal Solid Waste Collection and Disposal Services effective January 1, 1994.

8. By letter dated December 3, 1993, Poor Richard's, Inc. received a copy of Hennepin County Ordinance No. 15 (Ex. 3).

9. Poor Richard's, Inc. received, by certified mail, a letter dated December 21, 1993 (Ex. 4) notifying it that, as of January 1, 1994, all Hennepin County licensed haulers would be required to collect and remit the Solid Waste Management Fee. Enclosed with that letter was a notice of three help sessions to be held on February 8, 9, and 10, 1994. The help sessions were to assist the haulers in the implementation of Ordinance No. 15.

Attached and enclosed with the letter was a facts sheet regarding the Solid Waste Management Fee, a copy of the Hennepin County Solid Waste Management Report, along with the instructions on how to complete the report. Additionally, samples of inserts to be mailed to the hauler's customers were received by Poor Richard's, Inc.

10. Poor Richard's, Inc. received a letter dated February 2, 1994, (Ex. 15) from Hennepin County Environmental Management Division (EMD) which again extended assistance to all solid waste haulers to help clarify the reporting requirements and procedures for the implementation of Ordinance No. 15. The dates of the three scheduled help sessions were February 8, 9, and 10, 1994. Additionally, the letter notified the haulers that, if they were unable to attend any of those sessions, but still needed assistance, they could call for help from the Hennepin County Department of Public Works, Financial Management and Accounting Division. No one from Poor Richard's, Inc. attended the help sessions; nor did anyone from Poor Richard's, Inc. request assistance from the Financial Management and Accounting Division.

11. By letter dated February 24, 1994, (Ex. 6) from Charles N. Nauen, Timothy R. Thornton, attorney and counsel for Poor Richard's, Inc., was notified of the Hennepin County Ordinance No. 15 requirements. The letter also notified Poor Richard's, Inc.'s counsel that Hennepin County intended to enforce Ordinance No. 15 if the Solid Waste Management Fee was not paid.

12. By letter dated April 28, 1994, (Ex. 7) Poor Richard's, Inc. received notice that Hennepin County had not received reports or fees for the months of January, February, and March, 1994. The letter informed Poor Richard's, Inc. that failure to comply with Hennepin County Ordinance No. 15 may result in suspension or revocation of its hauler's license.

13. By letter dated May 13, 1994, (Ex. 8) Poor Richard's, Inc. was issued a conditional license and notified of conditions that had to be met no later than June 30, 1994 or its conditional license would be revoked. The conditions included submission of completed Ordinance No. 15 report forms and remittance of all Solid Waste Management Fees due. Additionally, attached to the letter was Poor Richard's, Inc.'s conditional hauling license.

14. By letter dated June 7, 1994, (Ex. 9) Poor Richard's, Inc. was notified that an audit would be conducted on June 15, 1994 of all records, all accounts, customer billings, and customer receipts.

15. On June 15, 1994, Hennepin County employees, Scott Loomer and Lois Cheeseboro, conducted an audit of Poor Richard's, Inc. Hennepin County accounts.

16. At the time of the audit, the auditors were furnished with photocopies of handwritten invoices to the Veterans Administration Medical

Center for the months of January through April, 1994. The invoices provided the auditors were not photocopies of invoices that were actually sent to the Veterans Administration Medical Center. The invoices provided to the auditors omitted one of the Veterans Administration Medical Center accounts.

17. Richard Wybierala, of Poor Richard's, Inc., claims that he was unable to provide copies of actual invoices that were mailed to the Veterans Administration Medical Center because his bookkeeper, Steve Isacson, who is

wheelchair-bound and quadriplegic, was at a conference outside the state of Minnesota. Lois Cheeseboro testified that while waiting for Richard Wybierala she did see a wheelchair-bound employee in the office of Poor Richard's, Inc. This testimony was not refuted by Mr. Wybierala. Thus, it can be inferred that the wheelchair-bound employee seen by Lois Cheeseboro on the date of the audit was Steve Isacson, the bookkeeper.

18. At the time of the audit, Mr. Wybierala represented to Lois Cheeseboro that he had received no money from the Veterans Administration Medical Center during 1994. However, this information was not correct. At time of the audit, Poor Richard's, Inc. had received three checks from the Veterans Administration Medical Center during 1994 as is evidenced by the Veterans Administration CALM 841 Report Display (Ex. 21).

19. Lois Cheeseboro prepared a summary of the audit conducted at Poor Richard's, Inc. on June 14, 1994 (Ex. 10). This report dated June 22, 1994 concluded that Poor Richard's, Inc. had not billed and collected the Solid Waste Management Fee in accordance with Ordinance No. 15 requirements nor had it reported or remitted the fees. It also concluded that Poor Richard's, Inc. had not received money from Veterans Administration or Hennepin County during 1994; and thus, since Poor Richard's, Inc. had no receipts, it had no Solid Waste Management Fees to remit (Ex. 10).

20. Lois Cheeseboro's summary of the audit and the conclusions contained therein were based upon incomplete and inaccurate invoices provided by Richard Wybierala. It was also based upon Mr. Wybierala's misrepresentation that he had received no money from the Veterans Administration during 1994.

21. Poor Richard's, Inc. did not meet the conditions of its May 13, 1994 conditional license in a timely fashion. The deadline for compliance with the conditions was June 30, 1994. Poor Richard's, Inc. did not submit any Hennepin County Solid Waste Management Report forms or management fees by the deadline.

22. By letter dated July 1, 1994, (Ex. 11) Poor Richard's, Inc. received Notice of Revocation and Nonrenewal of its Hennepin County hauler's license. The notice stated that Poor Richard's, Inc.'s conditional license would expire on July 15, 1994 and its annual license would not be renewed.

23. By letter dated July 5, 1994, (Ex. 12) Poor Richard's, Inc. appealed Hennepin County's notice of revocation of its hauler's license. Attached to the Notice of Appeal was Poor Richard's, Inc.'s first Solid Waste Management Fee Report submitted to Hennepin County. The report was dated July 5, 1994 and was for the month of June 1994. The report was not properly filled out. It listed the tons of waste hauled instead of billings, showed no receipts from Hennepin County accounts during the month of June, and showed no Solid Waste Management Fee owing. Contrary to the report signed by Richard A. Wybierala

for June 1994, Poor Richard's, Inc. had received money from both the Veterans Administration and Hennepin County during June 1994.

24. Poor Richard's, Inc. has two Hennepin County accounts for which it should bill, collect, and remit the Ordinance No. 15 Solid Waste Management Fee. Those accounts are with the Veterans Administration Medical Center and Hennepin County. Poor Richard's, Inc. had a contract with the Veterans Administration Medical Center for hauling during fiscal year 1993 (Ex. 13.) Poor Richard's, Inc. has a contract with the Veterans Administration Medical Center for hauling during the fiscal year 1994 (Ex. 14).

25. The Veterans Administration has a dispute with Poor Richard's, Inc. over the 1993 contract based upon alleged overbillings for disposal fees and charges for recyclable tonnages. By letter dated December 27, 1993, (Ex. 38) Mavis B. Nelson, the contracting officer for the Veterans Administration Medical Center, notified Poor Richard's, Inc. and Richard Wybierala that overcharges of \$52,645 were made during 1993 and the Veterans Administration would withhold payment on invoices until the overcharges were paid.

26. By letter dated February 28, 1994, (Ex. 39) the Veterans Administration provided Poor Richard's, Inc. with a monthly breakdown of the amounts overpaid. It notified Poor Richard's, Inc. that the amount overpaid Poor Richard's, Inc. was \$33,702.50 for the period of March 22, 1993 through September 30, 1993. The letter also put Poor Richard's, Inc. on notice that the Veterans Administration would not be making any more 1993 contract payments and would be setting-off the overcharges against 1993 and 1994 invoices. The letter stated in part as follows:

You have invoiced \$41,372.53 for October through January, 1994 and we purport charges should be \$25,612.54. As fiscal year 1993 overpayments are \$33,702.50, Poor Richard's owes VA a balance of \$8,089.96 if we continue to hold payment for October through January.

Ex. 39 at 4.

27. By certified letter dated April 19, 1994, the Veterans Administration issued its final decision reaffirming the government's position that it had overpaid Poor Richard's, Inc. by \$33,702.50 for the period of March 22, 1993 through September 30, 1993. The final decision also notified Poor Richard's, Inc. that the Veterans Administration would be recovering the overpayments on the current invoices, which included 1993 and 1994 invoices. The letter also notified Poor Richard's, Inc. of its appeal rights to the Board of Contract Appeals. Ex. 41.

28. A bill of collection was prepared by the Veterans Administration on April 21, 1994. This bill identified Poor Richard's, Inc. as the obligor and \$33,702.50 as the principal amount of the debt. Ex. 40.

29. This document was an internal document to the contracting officer at the Veterans Administration prepared by Mavis B. Nelson. Poor Richard's, Inc. did not receive a copy of this bill of collection.

30. Poor Richard's, Inc. disputed the final decision of the Veterans Administration. An appeal was filed under the Contracts Disputes Act of 1908 (41 U.S.C. § 601 et. seq.) by/for Poor Richard's, Inc. That claim was withdrawn by Poor Richard's, Inc. without prejudice. The dispute has not been resolved.

31. The Veterans Administration issued a check to Poor Richard's, Inc May 10, 1994, in the amount of \$1,601.86. The calculations that arrived at that amount are set forth in the Veterans Administration CALM 841 Report Display (Ex. 21) as follows:

INVOICE NUMBERPAYMENT AMOUNT

DEC 6430,6189-99	\$7,274.93
DEC 6430,6189-99	-7,000.00
JAN 6430,6189-99	8,494.96
JAN 6430,6189-99	-8,000.00
NOC 6430,6189-99	5,011.79
NOC 6430,6189-99	-5,000.00
OCT 6430,6189-99	4,820.19
OCT 6430,6189-99	-4,000.00

Ex. 21

32. Another check was issued to Poor Richard's, Inc. from the Veterans Administration in the amount of \$6,532.74 on May 10, 1994. The amount was arrived at from the following calculation:

INVOICE NUMBERPAYMENT AMOUNT

FEB 6430,6189-99	\$7,559.84
FEB 6430,6189-99	-7,000.00
MAR 6430,6189-99	8,675.40
MAR 6430,6189-99	-2,702.50

Ex. 21

33. A check was issued to Poor Richard's, Inc. from the Veterans Administration in the amount of \$8,082.80 on June 3, 1994. Ex. 21. This check was a payment not identified by month, but no deductions were taken in calculating the amount of the check. A check was issued to Poor Richard's, Inc. from the Veterans Administration on July 5, 1994, in the amount of \$7,968.36. The invoices that comprised this amount are as follows:

INVOICE NUMBERPAYMENT AMOUNT

6189-99	\$ 103.64
6189-99	6,787.32
6189-99	1,077.40

Ex. 21

34. The total amount paid to Poor Richard's, Inc. for waste hauling from January 1994 to April 1994, is \$32,698.56. Although Poor Richard's, Inc. did not receive a copy of the Veterans Administration CALM 841 Report Display, it acknowledges receipt of the checks issued as identified in the above Findings.

The Veterans Administration included the 14.5 percent Solid Waste Management Fee in those checks. The fees totaled \$4,577.80. Hennepin County estimated the invoice and fee totals as follows:

<u>MONTH</u>	<u>INVOICE TOTAL</u>	<u>FEE FOR SERVICE</u>	<u>14% SERVICE FEE</u>
January 1994	\$8,116.10	\$7,088.30	\$1,027.80
February 1994	7,286.27	6,363.56	922.71
March 1994	8,465.38	7,393.35	1,072.03
April 1994	7,913.81	6,911.63	1,002.18
Penalty @ 1.5%			60.37
May 1994	7,864.72	6,868.75	995.97
Penalty @ 1.5%			<u>76.22</u>
Total VA Account			5,020.69
Total VA Penalty			<u>136.59</u>
TOTAL			\$5,157.28

Ex. 22(a)

35. The amounts of the checks issued by the Veterans Administration do not correlate directly with any specific invoice amounts submitted by Poor Richard's, Inc. in 1994. The internal calculations set forth in the CALM 84 Report Display (Ex. 21) were not communicated to Poor Richard's, Inc. Nor do the Veterans Administration accompany these checks with any expressed instructions as to how the amounts were to be applied. However, Evan Smith, the assistant chief environmental manager responsible for managing the Poor Richard's, Inc. contract, spoke by telephone with Poor Richard's, Inc.'s bookkeeper, Steve Isacson, on numerous occasions in 1994 explaining to him the recalculations and adjustments made to the Poor Richard's, Inc.'s bills explaining how the set-offs were calculated and which invoices were being paid by each 1994 payment.

36. Richard Wybierala, on behalf of Poor Richard's, Inc., claims that payments received from the Veterans Administration during 1994 were not applied to invoices for services rendered during 1994, but instead were applied against the outstanding disputed balance owed by the Veterans Administration carried over from 1993. Poor Richard's, Inc.'s accounts show a past due balance owed from the Veterans Administration for 1993 of \$32,553.82. Thus, since Poor Richard's, Inc. treated the 1994 payments as payments for services rendered in 1993, Richard Wybierala claims Poor Richard's, Inc. was not obligated to bill for or pay the Solid Waste Management Fee. Hennepin County Ordinance No. 15 requires that "consistent with the hauler's normal billing practice, each hauler shall separately state and clearly label the Solid Waste Management Fee on each invoice or statement issued to the residential and nonresidential generators for payment of waste collection and disposal services." Ordinance No. 15, § III, subsection 3. This ordinance is effective January 1, 1994.

Poor Richard's, Inc. has never billed the Veterans Administration for the Solid Waste Management Fee during 1994 as required by Hennepin County Ordinance No. 15.

37. The Solid Waste Management Fee Reports filed by Poor Richard's, Inc. for the months of January through July 1994 (Ex. 17) do not list any billing for the Veterans Administration's accounts, nor do they show receipt of any money received by Poor Richard's, Inc.

38. Even though Poor Richard's, Inc. did not bill the fee to the Veterans Administration, the Veterans Administration added the 14.5 percent to the amount that was authorized to be paid by the Veterans Administration to Poor Richard's, Inc. The fee of 14.5 percent for the 1994 payments were not remitted to Hennepin County as required by Hennepin County Ordinance No. 15 III, subsection 2(A).

39. The Solid Waste Management Fee Reports for January through July 1994 including a revised June 1994 report, were received by Hennepin County on August 9, 1994. A previous June 1994 was filed on July 8, 1994.

40. Poor Richard's, Inc. has never paid to Hennepin County any Solid Waste Management Fee collected from the Veterans Administration.

41. Poor Richard's, Inc. invoice to Hennepin County (Ex. 18), dated July 4, 1994, shows that Poor Richard's, Inc. did not bill Hennepin County for the Solid Waste Management Fee. Poor Richard's, Inc. has not billed Hennepin County the solid waste management service fee during 1994.

42. The initial Solid Waste Management Fee Report for the month of June 1994 (Ex. 17(b)), filed by Poor Richard's, Inc. on July 8, 1994 showed that it had not received any money from Hennepin County nor any management fee due and owing. The initial report was completed incorrectly as to the Hennepin County account in that Poor Richard's, Inc. had received payment in the amount of \$280.30 from Hennepin County during June 1994.

43. The July 1994 Solid Waste Management Fee Report (Ex. 17) remitted to Richard Wybierala for Poor Richard's, Inc. on August 9, 1994 shows no receipt from the Hennepin County account and shows no management fee owing. This report is incorrect as remitted. Poor Richard's, Inc. had received payment from Hennepin County during July 1994 for hauling municipal solid waste.

44. Poor Richard's, Inc. did not timely remit the Solid Waste Management Fee collected from Hennepin County during 1994.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Hennepin County Board of Commissioners and the Administrative Judge have subject matter jurisdiction herein pursuant to Minn. Stat. §§ 400.08, subd. 4; 473.811, subd. 3(a), 5, 5(c); and 14.55, and the Hennepin County Ordinance No. 15 Solid Waste Management Fee and Hauler's License Ordinance.

2. Hennepin County has complied with all relevant substantive and procedural requirements of applicable statutes including the Administrative Procedures Act, rules, including the rules of the Office of Administrative Hearings, Administrative Procedures of Hennepin County Ordinance No. 15 and constitutional due process, and the matter is properly before the Administrative Law Judge.

3. Hennepin County has the burden of proof in this matter through clear convincing evidence as provided by Hennepin County Ordinance No. 15, § IV, subsection 12D.3.f.

4. Hennepin County properly advised Poor Richard's, Inc. of the procedures and availability of help in the implementation of billing, collecting, and remitting the Solid Waste Management Fee.

5. As a condition of license in Hennepin County, each hauler shall bill and collect the Solid Waste Management Fee from Hennepin County residential and nonresidential generators from whom they haul municipal solid waste pursuant to Hennepin County Ordinance No. 15, § III, subsection 1.A. During 1994, Poor Richard's, Inc. did not bill Hennepin County customers the Solid Waste Management Fee in violation of Hennepin County Ordinance No. 15.

6. Hennepin County Ordinance No. 15, § III, subsection 3 requires Hennepin County haulers to separately state and clearly label the Solid Waste Management Fee on each invoice or statement issued to their residential and nonresidential generators for payment of waste collection and disposal services.

7. Poor Richard's, Inc. did not bill its Hennepin County customers the Solid Waste Management Fee in a manner that separately stated and clearly labeled that fee in violation of Hennepin County Ordinance No. 15.

8. Hennepin County Ordinance No. 15, § III, subsection 2.A. and B. requires Hennepin County haulers to remit the Solid Waste Management Fee collected to the County by the 20th day of the month in which the Solid Waste Management Fee was collected by haulers. During 1994, Poor Richard's, Inc. received Solid Waste Management Fees from the Veterans Administration and failed to remit those fees collected to Hennepin County as required by Hennepin County Ordinance No. 15.

9. Hennepin County Ordinance No. 15, § III, subsection 2.B., requires each licensee to submit by the 20th day of the month following the month in which the Solid Waste Management Fee was collected a completed Solid Waste Management Fee form to the County. Poor Richard's, Inc. has failed to properly report the Solid Waste Management Fee on the initial June and July 1994 reports. For January, February, March, April, and May of 1994, Solid Waste Management Fee reports were not timely filed. All of the Solid Waste Management Fee Reports filed were improperly completed in that none of the reports have listed Veterans Administration billings fees received.

10. The Veterans Administration Medical Center is a federal agency subject to the Federal Acquisition Regulations. Under the Federal Acquisition Regulations (FAR), contract debts arise when an overpayment is made under government contract. 48 C.F.R. § 32.602. The Contracting Officer of the

Veterans Administration is obligated to determine if any debt is due to the government. 48 C.F.R. § 32.606(a). This determination occurs before any final determination under the Contract Disputes Act of 1978. 48 C.F.R. § 32.606(d). Once a contract is determined, the Contracting Officer is required to liquidate the debt by crediting the amount of the debt with any money owed and not already paid to the contractor. 48 C.F.R. § 32.606(b). The Veterans Administration has the right to set-off overpayments against payments for future services.

11. Poor Richard's, Inc. was properly notified by the Veterans Administration as to the 1993 contract dispute. Poor Richard's, Inc. was on notice that 1993 and 1994 payments for services were subject to set-off for 1993 Veterans Administration overpayments, consistent with Federal Acquisition Regulations and 48 C.F.R. § 32.606(b).

12. The Federal Acquisition Regulations supplant the common law right of a creditor to apply payments to any outstanding debt. Rather, an obligation is created running from the contractor to the government and that obligation can be satisfied by a set-off of amounts currently due. Thus, the total amount of deductions taken by the Veterans Administration from payments in 1994 of \$33,702.50 is the contract debt for overpayments.

13. The Veterans Administration properly notified Poor Richard's, Inc. of its final decision with respect to overcharges on invoices for the period of October 1, 1993 through March 31, 1994 under its contract with Poor Richard's, Inc. Thus, it was improper for Poor Richard's, Inc. to apply payment received from the Veterans Administration for 1994 services to 1993 accounts.

14. The Veterans Administration properly set-off amounts for overpayments made in 1993 against 1994 services. Those set-offs should be included in calculating the amount of Solid Waste Management Fees owed by Poor Richard's, Inc. to Hennepin County.

15. Poor Richard's, Inc. has a remedy of appeal of the Veterans Administration decision. Poor Richard's, Inc. did appeal that decision but withdrew that appeal without prejudice. Poor Richard's, Inc. is not entitled to unilaterally apply 1994 payments to 1993 disputed Veterans Administration balances.

16. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

17. Poor Richard's, Inc.'s hauler's license may be revoked pursuant to the authority of Hennepin County Ordinance No. 15, §§ III and IV, subsection 12A.

Based on the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED: That Hennepin County take appropriate action with respect to the conditional hauler's license of Poor Richard's, Inc.

Dated this 20th day of October, 1994.

PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

Minn. Stat. § 400.08, subd. 4(c) authorizes Hennepin County to require a condition of the solid waste hauler's license that the hauler collect a Solid Waste Management Fee from its customers that generate solid waste in Hennepin County and remit that fee to Hennepin County. Hennepin County Ordinance No. 15, § III, subsection 1 requires as a condition of licensure that each hauler shall bill and collect the Solid Waste Management Fee from its customers who generate solid waste in Hennepin County. The fee must be remitted to Hennepin County pursuant to Hennepin County Ordinance No. 15, § III., subsection 2. Poor Richard's, Inc. has one customer in Hennepin County, the Veterans Administration Medical Center, for which it has not billed or remitted the Solid Waste Management Fee. This fee is due for the months of January through May of 1994.

Hennepin County Ordinance No. 15, § III, subsection 3, further requires that each hauler separately state and clearly label the Solid Waste Management Fee on each invoice or statement. Poor Richard's, Inc. has not complied with this ordinance requirement that the Solid Waste Management Fee be separately stated and clearly labeled for the months of January through May 1994 for either the Veterans Administration Medical Center or Hennepin County.

Hennepin County Ordinance No. 15, § III, subsection 2D, requires solid waste haulers to submit a Solid Waste Management Fee Report on a monthly basis and submit it with the Solid Waste Management Fee by the 20th of each month. The January, February, March, April, and May Solid Waste Management Fee Reports were not timely filed. Although they now have been filed, these reports were improperly completed and that none of the reports have listed the Veterans Administration billing fees received. The initial June and July 1994 reports have been filed, but the Solid Waste Management Fees on these reports were not reflected.

Hennepin County Ordinance No. 15, § IV, subsection 2C, authorizes revocation of a conditional license and denial of a permanent license for failure to comply with the conditions specified in the conditional license. On May 13, 1994, Poor Richard's, Inc. was issued a conditional license to operate in Hennepin County from May 15 through July 15, 1994. Poor Richard's, Inc. provided notice that if the conditions of license, including requirements that all Solid Waste Management Fees and Solid Waste Management Reports be remitted, were not satisfied by June 30, 1994, its hauler license would be revoked. To justify revocation, Hennepin County must prove by clear and convincing evidence that Poor Richard's, Inc. has failed to meet the conditions of its conditional license that all Solid Waste Management Fees and Solid Waste Management Reports must be remitted and submitted by June 30, 1994. The clear and convincing standard is provided in Hennepin County Ordinance No. 15, § IV, subsection 12.D.3.f., which provides the administrative procedures available for suspension or revocation of a license.

Poor Richard's, Inc. had a contract with the Veterans Administration Medical Center for hauling during fiscal year 1993. The Veterans Administration has an on-going dispute with Poor Richard's, Inc. over this contract based upon overbilling for disposal fees and charges for recyclable tonnages. As a result of this dispute, the Veterans Administration notified Poor Richard's, Inc. that the use of an unlined landfill was a breach of the contract and that compensation could be due the Veterans

Administration. The Veterans Administration notified Poor Richard's, Inc. that overcharges were made during 1993 as a result of this breach and that the Veterans Administration would withhold payment on invoices until the overcharges were paid. In February 1994, the Veterans Administration provided Poor Richard's, Inc. with a monthly breakdown of the amounts overpaid. The fiscal year 1993 overpayments were determined to be \$33,702.50. Ex. 39 at 4. As a result of this dispute, the Veterans Administration did not remit payment on invoices submitted by Poor Richard's, Inc. for 1993 in order to recoup the overpayments determined. In fact, Poor Richard's, Inc. was notified that it owed the Veterans Administration a balance of \$8,089.96 if payments were withheld for October through January. On February 28, 1994, the Veterans Administration provided Poor Richard's, Inc. with a monthly breakdown of the amounts overpaid. The letter also stated:

You have invoiced \$41,372.53 for October through January, 1994 and we purport charges should be \$25,612.54. As fiscal year 1993 overpayments are \$33,702.50, Poor Richard's owes VA a balance of \$8,089.96 if we continue to hold payment for October through January.

Ex. 39, at 4.

A final decision by the Veterans Administration was issued on April 19, 1994 and Poor Richard's Inc. was notified of its right to appeal the decision to the Board of Contract Appeals. An appeal was effectuated, but the appeal was withdrawn without prejudice prior to the hearing herein. The matter remains unresolved.

Thereafter, the Veterans Administration made payments to Poor Richard's Inc. in May, June, and July 1994. These payments were for services rendered in 1994 by Poor Richard's Inc.. Although not specifically billed on the invoice for the services rendered in 1994, the Veterans Administration included the 14.5 percent Solid Waste Management Fee in its payment amount. Rather than apply the payments made in May, June, and July of 1994 to the invoices for services rendered in 1994, Poor Richard's Inc. allocated those payments to the unpaid balances in dispute for services rendered in 1993. Poor Richard's Inc. asserts that it is entitled to allocate these payments in any manner it sees fit unless the debtor specifically directs otherwise. Poor Richard's Inc. argues that the Veterans Administration did not specifically direct Poor Richard's Inc. how to apply the payments made in 1994. Whether the Veterans Administration directed Poor Richard's Inc. as to how to allocate the payments was disputed at the hearing. A witness for the Veterans Administration testified at the hearing that he spoke with Poor Richard's Inc.'s bookkeeper on numerous occasions in 1994 explaining the adjustments to Poor Richard's Inc. bills and how the payments for 1994 should be applied. The bookkeeper did not testify at the hearing and the Administrative Law Judge has accepted the testimony of the Veterans Administration witness.

Poor Richard's, Inc. argues that a creditor is entitled to allocate payment of a debt in any manner it sees fit unless the debtor specifically directs otherwise. Since there was no specific direction, Poor Richard's Inc. argues that it had the legal right to apply the payment to the earliest matured debt. It cites Restatement of Contracts, § 387 and 394 for this authority. It further cites Minnesota decisions which have followed the Restatement principles. These cases are cited in the Licensee's Brief in

Opposition to Revocation at p. 1. However, this argument ignores federal regulations which supplant the common law right of a creditor to apply payments to any outstanding debt. Under the Federal Acquisition Regulations, contract debts arise when an overpayment is made under a government contract. 48 C.F.R. § 32.602. The Contracting Officer of the Veterans Administration is obligated to determine if any debt is due the government. 48 C.F.R. § 32.606(a). This determination occurs before any final determination under the Contract Disputes Act of 1978. 48 C.F.R. § 32.606(b). Once a contract is determined, the Contracting Officer is required to liquidate the debt by crediting the amount of the debt with any money owed and not already paid to the contractor. 48 C.F.R. § 32.606(d). Thus, the federal regulations create a debt running from the contractor to the government and that obligation can be satisfied in a number of ways, including set-off of amounts currently due. The use of these funds to set-off the obligation owed by the creditor is still payment to the contractor for all purposes. Thus, the total amount of deductions taken by the Veterans Administration from the payments in 1994 is \$33,702.50, the same amount as that determined to be the contract debt for overpayment.

The checks issued to Poor Richard's Inc. by the Veterans Administration in May, June, and July, although substantially reduced, constituted the full payment for the services provided by Poor Richard's Inc. from January 1994 through May 1994. Although not specifically billed for the Solid Waste Management Fee, the Veterans Administration included the 14.5 percent Solid Waste Management Fee in its payment amounts that were reduced by the amount owing to the Veterans Administration. That the 14.5 percent Solid Waste Management Fee was included in the payment is supported by the testimony of Mavis Nelson, the contract officer who testified that she informed Poor Richard's Inc. that part of its bill should include the Solid Waste Management Fee. When Poor Richard's Inc. failed to comply with that request, the Veterans Administration added money to its bill for the fee. This payment was also demonstrated by the testimony of Evan Smith, the technical assistant to Mavis Nelson, of his conversation with Steve Isacson, Poor Richard's Inc.'s accountant. Smith testified that he had repeated conversations with Mr. Isacson about what the payments were for including the added amounts for the fee. The fee was not remitted to Hennepin County as required by Hennepin County Ordinance No. 15, § III, subsection 2.A. It is a serious violation for a licensed hauler to improperly retain money belonging to the licensor.

Poor Richard's, Inc. argued that it had difficulty complying with some of the recordkeeping and other technical aspects of Hennepin County Ordinance No. 15. It further asserts that its failure to comply with some of the recordkeeping and other technical aspects of the ordinance constitute minor inconsequential violations which do not justify the harsh punishment of revocation, particularly when the County "admitted that others with similar minor and inconsequential violations were not facing revocation." Brief in Opposition to Revocation at p. 5. As the Findings and Conclusions of this Report illustrate, Hennepin County provided notice of Hennepin County Ordinance

No. 15's requirement to Poor Richard's Inc. by certified mail. It also enclosed with that certified letter a notice of three help sessions to be held on February 8, 9, and 10, 1994. These help sessions were to assist the hauler in the implementation of Hennepin County Ordinance No. 15. Also enclosed with the letter was a fact sheet regarding the Solid Waste Management Fee along with instructions on how to complete the report. Poor Richard's Inc. did not attend any of the help sessions put on by the County nor did it

call to request assistance. Poor Richard's Inc. cannot now claim difficulty complying with the requirements of the ordinance if it did not avail itself of the assistance offered by the County. Nor is the failure to remit fees or to comply with other reporting requirements minor or inconsequential violations. The ordinance is clear that any license required under the ordinance may be suspended or revoked for violation of the provisions of the ordinance. Poor Richard's Inc. further suggests that the County has acted in an arbitrary and capricious manner by singling out Poor Richard's Inc. for ordinance enforcement while other haulers have not been similarly prosecuted. It cites for support of this argument Tamarac Inn v. City of Long Lake, 310 N.W.2d 474 (Minn. 1981) for its argument that a regulatory authority's decision to revoke or not renew a license is deemed arbitrary and capricious if it is based on minor or inconsequential violations of the applicable regulatory requirements. In Tamarac the judge had specific evidence of disparate treatment to show that the municipality was acting in an arbitrary and capricious manner. Here, no such evidence was presented. In fact, testimony submitted by Hennepin County at the hearing indicated that it has proceeded against other haulers who have failed to comply with Hennepin County Ordinance No. 15.

The Judge recognizes that twenty days prior to the contested case hearing Poor Richard's Inc. filed Solid Waste Management Fee Reports for January through July 1994, including a revised June 1994 report. These reports were received by Hennepin County on August 9, 1994. Certainly, if the tardy reports were the only violation here, revocation would not be appropriate. However, the violations of Hennepin County Ordinance No. 15 are more serious. As the Findings of this Report reflect, Poor Richard's Inc. failed to pay to Hennepin County the Solid Waste Management Fee collected from the Veterans Administration. Furthermore, Poor Richard's Inc. has consistently failed to appropriately bill its Hennepin County customers for the Solid Waste Management Fee, although given several opportunities to do so. It is interesting to note that when Richard Wybierala of Poor Richard's Inc. was asked whether or not he would bill the fee in the future, he responded that it was confusing, and he never answered affirmatively that he would. His explanations for failing to separately bill the Solid Waste Management Fee are not credible. Mr. Wybierala has been in the waste hauling business for many years and the Administrative Law Judge simply does not find it credible that Poor Richard's, Inc. did not have the capability to separately reflect the Solid Waste Management Fee on its invoices.

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